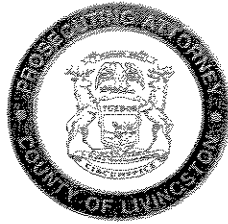


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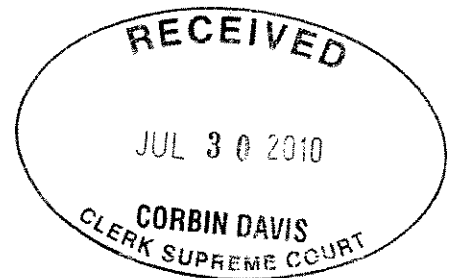
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July 29, 2010

Corbin R. Davis  
Clerk of the Court  
Michigan Supreme Court  
P.O. Box 30052  
Lansing, MI 48909

Re: ADM File No. 2009-19

Dear Mr. Davis:



The proposed amendment to MCR 7.205 limiting the time within which to file an application for leave to appeal will have an adverse impact in criminal cases on prosecutors seeking to file interlocutory applications. The practical effect of the proposed amendment will be to require the filing of applications before transcripts can be obtained, which will either require the Court of Appeals to delay making a decision on the application until the transcripts are provided or to make a decision on an application based on incomplete information. In either circumstance, the parties will be deprived of the ability to make their case at the application stage without the appropriate record.

Generally, prosecutors file an application seeking leave to appeal in cases where a trial court has granted a motion for a new trial or suppresses evidence. Previously, in cases where a trial court suppressed evidence, the prosecutor could dismiss the case, proceed by filing a claim of appeal, and file a brief after transcripts have been provided. Because that practice has now been foreclosed to prosecutors, appeals in those cases must proceed by application.

In order to adequately file such an application, review of the transcripts is an absolute necessity. Even relying on a trial prosecutor with a near photographic memory, accurately determining what the trial court considered and decided would be a challenge under the best of circumstances. But cases in which an appeal is to be considered rarely presents the best circumstances or the clearest understanding of what the trial court actually did. Having a transcript available enables the appellate prosecutor to undertake a close and more detached view of the case and to weed out those potential appeals that fail to withstand such scrutiny. Absent a transcript, the appellate prosecutor would be forced to file an application simply to preserve the ability to obtain appellate review.

Clerk of the Court  
Michigan Supreme Court  
July 29, 2010  
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Similarly, if a new trial is granted in a case, determining whether an error might be harmless generally requires a review of the entire record. There may also be issues of waiver and forfeiture that might go unrecognized absent a transcript. Since granting an application is generally limited to the issues raised in the application under MCR 7.204(D)(4), filing an application on incomplete information might foreclose the consideration of valid claims or argument that cannot be resurrected.

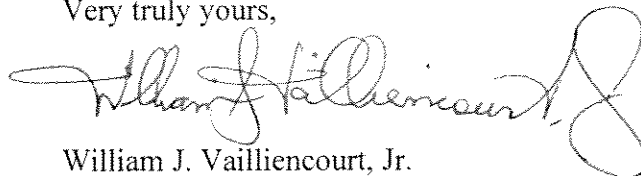
The shortened time frame also adversely affects criminal defendants. Under MCR 6.429(B)(4), a defendant must file a motion for resentencing within the time to file an application for leave to appeal. Given the shortened time limits, the proposal might force a defendant's appellate counsel to file a motion for resentencing without a transcript of the sentencing.

A separate question is raised by the "excusable *neglect*" standard. Does intentionally waiting to file an application until transcripts are prepared fall within that standard? It clearly is excusable, but is it neglect? And even though the decision to wait would be perfectly defensible, would an attorney ever want to knowingly engage in conduct that is characterized as neglect?

While the Court's desire to shorten the lengthy time frame within which to file a delayed application is a worthy objective, the current proposal will have the practical effect of requiring the filing of an application on incomplete information. Perhaps limiting delayed applications to six months, or even ninety days, with a continued requirement to provide a statement of facts explaining the delay, will serve the Court's goal while ensuring the ability to review a transcript before filing an application. Another option might be to require the ordering of transcripts within twenty-one days of the order and the filing of the application within twenty-one days of the filing of transcripts. The current proposal, however, simply presents too many obstacles.

Thank you for your consideration.

Very truly yours,

A handwritten signature in dark ink, appearing to read "William J. Vaillencourt, Jr.", with a large, stylized flourish at the end.

William J. Vaillencourt, Jr.  
Assistant Prosecuting Attorney